IN THE

Supreme Court of the United States

October Term, 1966

No. ~~1168~~ 69

VOLKSWAGENWERK AKTIENGESELLSCHAFT,
Petitioner,

against

FEDERAL MARITIME COMMISSION and
UNITED STATES OF AMERICA,
Respondents,

PACIFIC MARITIME ASSOCIATION and
MARINE TERMINALS CORPORATION,
Intervenors.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INDEX

Table of Cases Cited

Table of Statutes Cited

Table of Other Authorities Cited

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioner, Volkswagenwerk Aktiengesellschaft, prays for the issuance of a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered December 22, 1966.

Opinions Below

The opinion of the Court of Appeals for the District of Columbia (App. A, *infra*, pp. 1a-25a) and those of the Federal Maritime Commission (R. 6[illegible]a-728a)* are not yet reported.

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* "R." refers to the Joint Appendix printed for the court below.

Jurisdiction

The judgment of the Court of Appeals (App. B, *infra*, p. 26a) was entered on December 22, 1966. This Court's jurisdiction is invoked under 28 U.S.C., section 1254(1).

Questions Presented

1. Whether section 15 of the Shipping Act of 1916 (46 U.S.C., section 814), embracing "every agreement * * * providing for [a] * * * cooperative working arrangement" among covered persons, requires filing with the Federal Maritime Commission of an agreement by which one hundred twenty regulated enterprises acting under the domination of shipping lines, are exacting from cargo entering or leaving United States Pacific coast ports five million dollars annually through unequal assessments which impose a disproportionate burden upon petitioner's automobiles which travel predominantly on chartered vessels.

2. Whether charging Volkswagen vehicles ten times more per ton, and raising their discharge costs ten times more than that of other cargo not in competition with automobiles, for the same benefits relating to stevedoring and terminal handling, violates section 16 of the Shipping Act of 1916 (46 U.S.C., section 815), which prohibits common carriers and other regulated persons from subjecting anyone to "undue or unreasonable prejudice or disadvantage" and section 17 of the Act (*id.*, section 816) which demands the enforcement of "just and reasonable regulations and practices."

3. Whether, in any event, the decision below should be reversed because to sustain the agency's action the court resolved for itself factual and legal issues which the Commission, deeming them outside the case, had never reached or considered.

Statutes Involved

The relevant provisions of the Shipping Act of 1916, as amended, 46 U.S.C., sections 801 *et seq.*, follow:

Section 15, 46 U.S.C., section 814.

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.
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Section 16, 46 U.S.C., section 815.

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> It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—
>
> First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, lo-

cality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

* * *

Section 17, 46 U.S.C., section 816.

* * *

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

5 U.S.C., section 706 reads as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Statement of the Case

PMA's Tonnage Tax. In 1960-1961, the Pacific Maritime Association ("PMA"), an association of employers of on-shore and off-shore maritime labor on the Pacific coast, and the International Longshoremen's and Warehousemen's Union ("Union" or "ILWU"), collective bargaining agent for the waterfront employees, took a most praiseworthy forward step. The Union agreed to permit the introduction of labor saving arrangements in return for the creation, over a period of five and a half years, of a "Mechanization and Modernization Fund" ("Mech Fund" or "Fund") of twenty-nine million dollars to be used to cushion the effects of higher productivity upon its members (R. 243a-344a, 618a-620a, 668a-669a, 685a-686a; App. A, 2a-3a). PMA successfully insisted, however, that the Union should have no voice regarding how this sum was to be raised (R. 210a-211a, 284a, 668a).

PMA has about one hundred and twenty members (R. 555a-587a). Among them are the respondents in the

Commission proceeding, Marine Terminals Corporation and Marine Terminals Corporation (of Los Angeles) (collectively referred to as "MTC"), which discharge, and supply terminal facilities for, Volkswagen automobiles at San Francisco and Long Beach, California (R. 614a-616a, 667a, 682a-685a; App. A, 2a). Membership in PMA is open to carriers, stevedores and terminal operators, but not to shippers (R. 383a; App. A, 2a).

PMA decided to raise the monies for the Fund through a "tonnage tax" under which PMA collects a stipulated amount for each ton of cargo loaded or discharged on the Pacific coast by or for a PMA member (R. 466a-480a, 372a-377a, 588a-593a, 622a-625a, 668a-669a, 686a-692a; App. A, 3a-4a, 20a-21a). The exactions are unequal; some traffic is burdened more, some less. General cargo, including automobiles, pays five times as much per ton as does bulk cargo or scrap metal, and ten times the rate fixed on coastwise shipments of logs and lumber (R. 76a-79a, 348a-349a, 354a-355a, 366a, 490a-491a, 521a-522a, 624a-625a, 631a, 668a-669a, 690a-692a).* The result was a general cargo rate of 27½ cents a ton, a rate of 5½ cents per ton for bulk cargo and scrap metal, and a 2½ cent rate for logs and lumber in the coastwise trade (*ibid.*). The monies are paid to PMA by the on-shore members handling the cargo (R. 76a-77a, 367a-368a, 588a-593a).

The PMA-ILWU agreement provided that employers not belonging to PMA should "contribute to the Mechanization Fund at comparable rates and in a like fashion" (R. 284a, 631a-632a). PMA considered it "essential that

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* One of the first adjustments PMA made in its tax was to cut in half the assessments on coastwise shipments because this is "a very marginal business economically" (R. 490a, 366a). Subsequently, the levy on lumber moving in this trade was dropped still further to 2½ cents per ton (R. 348a-349a, 354a-355a). According to an internal PMA memorandum, the original assessment "would [have] put the coastwise lumber industry out of business" (R. 503a).

non-members be required to pay a similar assessment for competitive reasons" (R. 491a; see also R. 367a, 503a).

Petitioner is the German corporation which manufactures Volkswagen vehicles. Under the PMA plan automobiles are assessed on measurement tonnage (R. 625a-626a, 669a, 695a; App. A, 4a). Since Volkswagen vehicles average 8.7 tons, the PMA tax is about $2.35 per vehicle (R. 626a; App. A, 4a-5a). This represents almost twenty-five percent of their total cost of discharge—$10.45—prior to the PMA tax (R. 135a, 140a, 148a-149a, 175a-176a, 482a, 510a, 512a, 676a, 696a). By contrast the discharge cost of other general cargo is raised only about 2.2 percent (R. 149a-150a, 482a, 512a, 696a).

Direct labor costs reflect the same ten to one ratio. Before the PMA tax these costs averaged 49 cents per ton for Volkswagen vehicles (R. 167a-169a, 697a). PMA's assessment of 27½ cents per ton increases them fifty-six percent. By contrast, for all other cargo the Fund assessments represent only about five percent of direct labor costs (*ibid.*).

If the impact of the PMA tax upon Volkswagen automobiles is compared with the treatment accorded favored commodities, such as bulk cargo, scrap metal and coastwise lumber, which pay only one-fifth or one-tenth as much as general cargo, the ratio varies from fifty to one for the former to one hundred to one for the latter.

There was no likelihood that, due to the labor savings made possible by the Mech Fund, the cost of discharging Volkswagen automobiles would drop more than that of other cargo (R. 633a-634a, 670a-671a, 696a-697a; App. A, 24a-25a). As the Commission found, "stevedoring of cars has always been an efficient and economical operation, and testimony in the record shows that there is little likelihood of mechanical improvement in the method of unloading automobiles, and auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown" (R. 670a-671a).

PMA's Shipping Lines Refuse Relief. Since the tonnage by weight of Volkswagen vehicles is roughly one-tenth their measurement tonnage (R. 166a-167a, 626a), the burden upon Volkswagen automobiles could easily have been brought into line with that placed on other general cargo by predicating the PMA assessment on weight rather than measurement. Petitioner made every effort to secure some such adjustment (R. 481a-485a, 511a-514a, 519a-521a, 628a-629a; App. A, 4a-5a). All this accomplished, however, was a ruling by PMA that automobiles, uniquely, were always to be taxed upon their measurement tonnage, although all other cargo pays upon the basis of whatever tonnage, weight or measurement, is shown on the ship's manifest (R. 80a-86a, 102a-103a, 519a-520a, 524a-525a, 628a-630a, 669a-670a; App. A, 23a-24a).

The decision as to what petitioner's cargo should pay rested with the shipping lines which control PMA. Under PMA's by-laws these lines elect a majority of PMA's directors and control the vote at its membership meetings (R. 383a-389a, 525a-538a; App. A, 10a). Although the Mech Fund involved a labor cost of PMA's stevedoring and terminal operation members, all the members of both the PMA committee appointed to consider initially how this cost should be allocated and the committee subsequently formed to pass upon any resulting inequities represented shipping line interests (R. 75a-76a, 90a-92a, 538a-570a, 686a-687a; App. A, 10a).

Under PMA's plan, its carrier members ultimately foot the bill for the Fund assessment on cargo brought by them to this country (R. 367a-368a). If tax considerations had not interfered, they would have borne it directly (R. 77a, 367a-368a, 521a-523a, 588a-593a). On cargo sent by chartered vessel or non-PMA liners, however, the PMA onshore operator has to seek reimbursement from his nonmember customers (App. A, 5a). Over seventy percent of petitioner's cargo is carried by chartered vessel (R. 614a), and much of the remainder by non-PMA carriers

(R. 164a, 525a-538a, 632a). Consequently, the more Volkswagen automobiles pay towards the five million dollars needed annually, the less has to come out of the pockets of PMA's carrier members (see App. A, 10a-11a).*

MTC's Efforts to Collect the PMA Tax. MTC's profit on the discharge and terminal handling of each Volkswagen vehicle was one dollar or less (R. 145a). As a matter of practical economics, therefore, the PMA tax of about $2.35 per vehicle could not be absorbed, but by necessity had to be passed on to petitioner (R. 151a-153a, 241a-242a, 510a, 519a, 630a, 670a, 725a-726a; App. A, 5a).

When petitioner refused to pay, MTC wrote PMA on March 1, 1961, asking for advice on "what stand we can take in demanding payment of this assessment" and reporting that it had informed petitioner's representatives that MTC was "considered only a collection agency in this matter" (R. 486a-487a; App. A, 5a). In December 1961 PMA's directors took up "the problem of collecting funds from Volkswagen due the Mechanization Fund" and granted MTC's request for "legal and moral support" and authority "to bring suit against Volkswagen for the monies due" (R. 356a; App, A, 5a).

But when litigation finally started it took the form of a suit by PMA against MTC and its other on-shore members engaged in discharging Volkswagen automobiles for the unpaid assessments (R. 18a-24a). MTC impleaded petitioner (R. 28a-30a), which secured a stay pending determination by the Federal Maritime Commission whether

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* PMA's shipping lines vote the way their self-interest dictates. This is not denied but insisted upon by the organization's own counsel:

> "PMA members, like members of similar organizations, are not altruistic. It is probable that each member of PMA will exercise its voting power in its self-interest and will seek to persuade other members to its views whether or not they have the same interest." (Brief of PMA to Examiner, p. 11).

the Shipping Act had been violated (R. 613a-614a; App. A, 5a-6a).

The Proceedings Below. Petitioner filed a complaint with the Commission, naming MTC as respondents and challenging the legality under sections 15, 16 and 17 of the Shipping Act of the underlying agreements among the members of PMA and the acts taken by them in execution of these agreements (R. 12a-17a). PMA made itself a party to this proceeding by intervening (R. 43a-57a, 1a).

The examiner's initial decision was adverse to petitioner (R. 611a-656a; App. A, 8a). On exceptions, a majority of the Commission sustained the examiner (R. 666a-678a; App. A, 8a-10a), and dismissed the complaint (R. 729a). Commissioner Hearn disagreed with the majority and thought section 15 breached (R. 772a-728a). Commissioner Patterson strongly dissented on all points (R. 678a-722a). In a lengthy opinion, the Court of Appeals for the District of Columbia Circuit affirmed, indicating that, at least as to the section 15 issue, it was acting "with some hesitation" (App. A, 15a).

Reasons for Granting the Writ

The decisions below gut a major federal statute. They seriously impair the regulatory scheme created by Congress to control the monopoly powers permitted maritime cartels. They license the very abuses which Congress thought to end half a century ago when it enacted the Shipping Act: unfair discrimination and retaliatory action against shippers employing the services of carriers not part of the anti-competitive combination. H.R. Doc. No. 805, 63d Cong., 2d Sess., 417-421 (1914) ("Alexander Report").

Misunderstanding legislative history, the Federal Maritime Commission has refused to apply the Act as written and as interpreted until now by itself and by this Court. As construed by the Commission in this case, the Shipping Act permits a combination of common carriers and related

maritime enterprises to exercise unsupervised quasi-governmental taxing powers in relation to the waterfront. This in the face of the Act's requirement that there be filed with the Commission for approval "every agreement" among covered persons "providing for [a] * * * cooperative working arrangement." That this private levy exacts, for identical benefits, ten times, or even one hundred times, as much from automobiles as from other cargo is held not to contravene the Act's prohibitions against discriminatory charges and unreasonable practices. Great uncertainty, putting in doubt the legal status of hundreds of agreements, has been created regarding important questions of federal law affecting the entire maritime industry. Dissipation of such confusion in this important area is imperative.

Moreover, the failure of the court below to respect its judicial responsibilities and limitations calls for the exercise of this Court's supervisory power. In deferring reluctantly to the agency's construction of section 15, the Court of Appeals abdicated its judicial responsibilities. On the other hand, when it sustained the agency's decision with respect to sections 16 and 17 on new grounds and findings, it invaded the administrative area.

I

How section 15 of the Shipping Act should be construed raises an important question of federal law which has not been, but should be, settled by this Court.

Section 15 of the Shipping Act was intended to bring under governmental supervision all collective action by steamship lines and related maritime enterprises.

Early in this century, an exhaustive investigation by the House Merchant Marine and Fisheries Committee of the maritime industry, summarized in the Alexander Report, disclosed that:

> "[S]teamship companies, through private arrangements, have secured for themselves monopolistic powers as effective in many instances as though they were statutory. * * * They exercise their powers as private combinations and are apt to abuse the same unless brought under effective government control." H. R. Doc. No. 805, 63d Cong., 2d Sess., 418 (1914).

Exporters and importers filed complaints with the Committee, objecting, among other things, to excessive rates, discrimination among shippers in rates and cargo space and retaliatory action against shippers employing the services of carriers not part of the anti-competitive combination (*id.*, p. 417).

The Committee "concluded that the conference system had produced substantial evils and that it should not be permitted to continue without governmental supervision." *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213, 218-219 (1966). The Shipping Act followed. *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U.S. 481, 490 (1958).

The Act's key section, section 15, requires the filing for agency scrutiny of "every agreement" among covered persons falling into any one of seven categories. Included are agreements "fixing or regulating transportation rates or fares; * * * controlling, regulating, preventing or destroying competition; * * * or in any manner providing for an exclusive, preferential or cooperative working arrangement " (46 U.S.C., section 814).

A. The Commission's Refusal to Give the Statutory Language its Plain Meaning Frustrates the Legislative Intent.

Conceding that the "literal language of section 15 is broad enough to encompass any 'cooperative working arrangement' " among covered persons, the examiner and the Commission, nevertheless, put PMA's levy outside the scope of that provision (R. 639a-640a, 643a-650a, 673a-676a). According to a majority of the Commission:

> "[T]he legislative history is clear that the statute was intended by Congress to apply only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives" (R. 674a, 725a).

In the view of three members of the Commission, the PMA arrangement does not meet this test because of the absence of "an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators" (R. 675a). But the majority's restrictive reading cannot be reconciled with the statutory scheme nor with prior interpretations.

First, section 15 is not confined to agreements between persons in competition with one another. On the contrary, "every common carrier by water, or other person" is required to file a copy of "every agreement with another such carrier or other person." A freight forwarder does not vie for business with a carrier, yet "agreements or understandings * * * *between forwarders and carriers* may be discriminatory in such a way as to violate the provisions of § 15." *United States* v. *American Union Transp., Inc.*, 327 U.S. 437, 447 (1946) (emphasis supplied). Similarly, it could scarcely be maintained that a lessor of terminal facilities as such is in competition with his lessee, but such a lease may nonetheless be subject to section 15. *Agreements Nos. 8225 and 8225-1*, 5 F.M.B. 648 (1959), *aff'd sub. nom., Greater Baton Rouge Port Comm'n* v. *United States*, 287 F.2d 86 (5th Cir. 1961), *cert. denied*, 368 U.S. 985 (1962).

Second, if Congress only intended to cover agreements affecting competition, why, in addition to agreements "controlling, regulating, preventing or destroying com-

petition" did it carefully enumerate and define six other categories of agreements to be filed?

Third, if only shippers and travellers are protected, why is the Commission directed to condemn agreements found to be "unjustly discriminatory or unfair as between carriers * * * or ports"?

Looking to the plain meaning of the words Congress employed in section 15, PMA's plan is squarely covered. Not only is it a "cooperative working arrangement" among persons subject to the Act—as was acknowledged by the court below, all members of the Commission and the examiner—but, it is one "fixing or regulating transportation rates or fares" and "controlling, regulating, preventing or destroying competition."

By establishing a uniform and artificial cost which must be recouped from the customers of the participants, the plan fixes rates, as Commissioner Patterson pointed out in his illuminating dissent:

> "The effect of the measurement tonnage measure and assessment was to create a new cost element in addition to pre-existing rates for terminal facilities. Respondents [MTC] had to increase their charges to their customers to recover the new costs and thereby the total transportation cost of moving automobiles was increased. The measurement ton assessment on automobiles became a part of the Respondents' rate structure." (R. 709a).

PMA's tonnage tax also affects competition. PMA's on-shore members by committing themselves to pay PMA approximately $2.35 for every vehicle they handled, curbed their ability to compete by lowering their prices.

Indeed, wages always affect prices. However, labor's special standing may immunize such effect from the antitrust laws, if it is a legitimate consequence of a collective bargaining agreement requiring labor to be paid in propor-

tion to use. But wholly different considerations apply if employers, acting in concert by agreement, artificially allocate a common labor cost to specific commodities, discriminating against outsiders and subsidizing their own businesses. To quote Commissioner Patterson again:

> "If a group of competitors agree to share a cost element such as the rental of a pier and terminal area and then allocate the rent after a collectively made decision to named customers or specified types of property, instead of allowing actual use to govern the allocation, they thereby distort the normal forces of the market by their agreement to allocate, which is the equivalent of control" (R. 710a).

Creation of an unavoidable artificial cost element is a far more effective price-fixing device, *pro tanto*, than a mere exchange of promises regarding future prices.

Only because the Commission erroneously thought the terms of an agreement, rather than its practical and economic consequences to be critical, was it able to conclude that PMA's levy did not affect competition. It searched for proof of an explicit contractual commitment among PMA's on-shore members to pass the agreed upon assessments on to their customers and found none (R. 675a-676a) because the underlying economic necessities made such commitment superfluous. But where anti-competitive arrangements are involved, as this Court has observed in comparable contexts:

> "[J]udicial inquiry is not to stop with a search of the record for evidence of purely contractual arrangements. The Sherman Act forbids combinations of traders to suppress competition. * * * [W]hether an unlawful combination or conspiracy is proved is to be judged by what the parties actually did rather than by the words they used." *United States* v. *Parke, Davis & Co.*, 362 U.S. 29, 44 (1960).

See also *United States* v. *General Motors Corp.*, 384 U.S. 127, 142-143 (1966); *Eastern States Retail Lumber Dealers' Ass'n* v. *United States*, 234 U.S. 600, 612 (1914).

Under the Commission's view of when an agreement is anti-competitive, the Shipping Act places no inhibitions on PMA's power. If automobiles, which provide little revenue for PMA's carrier members, can be assessed one hundred times as much, proportionately, as coastwise lumber, PMA, by raising the assessment high enough could stop the shipment of all automobiles to the Pacific coast (R. 212a). PMA's cooperative working arrangement enables a private group to regulate business through a quasi-governmental levy, burdening, and therefore discouraging, competitive transportation, such as the carriage of Volkswagen vehicles by chartered vessels, and subsidizing the group's own enterprises, like coastwise shipping.

But even if the PMA plan had no impact upon competition, as a "cooperative working arrangement" among covered persons, it would be within section 15. The very legislative materials cited by the Commission (R. 674a), the Alexander Report and the 1961 hearings on amendments to the Shipping Act, establish that Congress intended all agreements described in section 15 to pass governmental scrutiny whatever their actual competitive effect.

In 1961, the House Merchant Marine and Fisheries Committee considered amending section 15 to give the Commission's predecessor power to "exempt [an] agreement or a category of agreements" upon finding that it "does not limit or restrict competition between the parties thereto or between such parties and others." S. Doc. No. 100, 87th Cong., 2d Sess., 27, 73 (1962).

After the Assistant Attorney General in charge of the Antitrust Division opposed the amendment on the ground "that all agreements described in section 15 can be presumed to limit or restrict competition or they would not

have been included in the language of the section'"* the proposal was abandoned. *Id.* at 28.

With full awareness of the fact that not all the agreements described in section 15 were necessarily anti-competitive, Congress refused to permit any exceptions. What the Commissioner is doing here is arrogating the power to exempt agreements from the requirements of section 15—a power which Congress deliberately denied to it. The legislative intent found exact expression in the all-inclusive language Congress adopted after exhaustive study in 1916 and which it reenacted without modification in 1961 after equally thorough study and consideration. H. R. Doc. No. 805, 63d Cong., 2d Sess., (1914); 75 Stat. 763 (1961); S. Doc. No. 100, 87th Cong., 2d Sess., v (1962); H.R. Rep. No. 1419, 87th Cong., 2d Sess., 335 (1962). That intent can be realized only by according its plain meaning to the language which Congress "selected as a matter of deliberate choice." *Carnation Co. v. Pacific Westbound Conference, supra,* 383 U.S. 213, 220 (1966).

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* *Hearings Before the Special Subcommittee on Steamship Conferences of the House Committee on Merchant Marine and Fisheries,* 87th Cong., 1st Sess., 428 (1961). This is the testimony which the Commission cites in support of its refusal to read the language of the statute as written (R. 674a).

The following year, the Antitrust Subcommittee of the House Judiciary Committee, which conducted an exhaustive investigation of the administration of the Shipping Act, categorically rejected a request by the Commission's predecessor for clarification of section 15. H.R. Rep. No. 1419, 87th Cong., 2d Sess., 335 (1962). Speaking of this predecessor, the Subcommittee said (at 359-360):

> "For a period of almost 45 years, lethargy and indifference have characterized its attitude, laxity and inefficiency its procedures, and frustration and ineffectiveness its administration of the regulatory features of the shipping acts."

B. The Court Below Should Not Have Deferred to an Erroneous Administrative Construction Predicated on Conventional Judicial Grounds.

On petition to review, the agency's construction of section 15 as excluding agreements which do not affect competition was accepted, *per curiam*, by the Court of Appeals, "albeit with some hesitation," in "deference to the expertise of the Commission" as a "tenable one and not arbitrary or capricious" (App. A, 15a-16a).

The Commission enjoys relative freedom from judicial interference in the fashioning of discretionary relief. *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607 (1966). But this does not, as the court below concluded, insulate from critical examination the Commission's disposition of an issue of statutory construction which is peculiarly within the judicial competence and which the agency made plain it decided by application of the standards employed by the courts rather than in reliance on considerations within its special province. *Cf. Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263, 270 (1960). The Administrative Procedure Act preserves the power of the courts to reject agency action "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C., section 706(2).

All that the Commission invoked in support of its construction were traditional tests of a purely legal nature: the Act's legislative history and a decision construing a provision of the Interstate Commerce Act (R. 674a-675a).*

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* *Kennedy* v. *Long Island R.R.*, 211 F. Supp. 478, 489 (S.D.N.Y. 1962), *aff'd*, 319 F.2d 366 (2d Cir. 1963), *cert. denied*, 375 U.S. 830 (1963). There, a railroad strike insurance plan was held not to be an agreement providing "for the pooling or division of traffic, or of service, or of gross or net earnings or of any portion thereof" and therefore not to require the approval of the Interstate Commerce

Since the Commission consists of laymen as well as lawyers, the court below was far better equipped by training and experience than the agency to give these matters their proper value. Neither the "substantial evidence" rule nor related inhibitions on judicial interference with agency action with regard to a specific record or factual situation had any part to play. Only such weight should have been given the Commission's construction as was appropriate having regard to "the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Federal Maritime Board* v. *Isbrandtsen Co., supra,* 356 U.S. 481, 499-500 (1958); *National Labor Relations Board* v. *Brown,* 380 U.S. 278, 290-292 (1965); *Federal Trade Comm'n* v. *Colgate-Palmolive Co.,* 380 U.S. 374, 385 (1965); *Milk Transp., Inc.* v. *Interstate Commerce Comm'n,* 190 F. Supp. 350, 354-355 (D. Minn. 1960), *aff'd,* 368 U.S. 5 (1961).

Commission under section 5(1) of the Interstate Commerce Act, 49 U.S.C., section 5(1). It is self-evident that deliberately different statutory language was being interpreted. In fact, the Second Circuit specifically pointed to the difference in language in distinguishing the opposite results reached under the Federal Aviation Act (49 U.S.C., section 1382) which, like the Shipping Act, requires approval of any "cooperative working arrangements" (319 F.2d at 374 n. 11). The Interstate Commerce Act, unlike the Federal Aviation Act and the Shipping Act, originally gave the Interstate Commerce Commission no authority to exempt agreements from the antitrust laws. Such authority was first conferred in 1948 (62 Stat. 472, 49 U.S.C., section 5b), but was not involved in the case before the Second Circuit.

C. Hundreds of Agreements Are Affected By The Present Uncertainty Regarding the Questions of Federal Law Here Involved.

Of the over seven hundred current agreements among carriers on file in June 1966, eighty are described in the Commission's annual report as "miscellaneous cooperative working arrangements." * In the future such an agreement need be filed only if it explicitly regulates competition for the business of the shipping and travelling public. Neither the shippers the Act was designed to protect, nor the carriers it was to control, can now be certain which agreements are subject to governmental surveillance, and must be filed and approved before being put into execution, and which need not. Just as Congress apprehended, many anti-competitive arrangements will now escape governmental scrutiny. In fact, the court below, acquiescing in the Commission's exclusion of PMA's arrangement from section 15, treats as outside the case "petitioner's claim that it is the target of a combination in restraint of trade" (App. A, 25a n.13).

In addition, the unsettling effects of the Commission's erroneous construction of section 15 may affect other regulatory legislation, in particular, section 412 of the Federal Aviation Act (49 U.S.C., section 1382), which is modeled on the earlier statute and like it applies to any "cooperative working arrangements." Until now the Civil Aeronautics Board has assumed jurisdiction over any agreements meeting this description and fairly comparable to the one involved in this litigation. *Cf. Airlines Negotiating Conference Agreements,* 8 C.A.B. 354 (1947); *Six-Carrier Mutual Aid Pact,* 29 C.A.B. 168 (1959).

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* F.M.C. Fifth Annual Report, 9 (1966). In 1965-1966 alone about one thousand agreements were filed under section 15. (*Id.* at 9, 18, 20, 21.) If, in reliance upon the Commission's interpretation, agreements are withheld from filing, remedial legislation may prove necessary should such reliance prove to have been misplaced. See, 78 Stat. 148 (1964); H.R. Rep. No. 1126, 88th Cong., 2d Sess. (1964).

Disruption of the Shipping Act's regulatory scheme and repercussions in related fields can be avoided only by prompt correction of the erroneous view taken below regarding important questions of federal law.

II

The construction placed below on sections 16 and 17 of the Shipping Act is in conflict with decisions of this Court.

Two sections of the Shipping Act deal with the specific abuses disclosed in the Alexander Report: unjust discrimination against individual shippers at the whim of the powerful shipping combines. Section 16 makes it unlawful for any covered person "either alone or in conjunction with any other person, directly or indirectly * * * to subject any particular person, locality or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever." 46 U.S.C., section 815. Section 17 requires every such person to "establish, observe and enforce just and reasonable regulations and practices." 46 U.S.C., section 816.

For the same benefits all cargo receives from the Mech Fund, that is, the opportunity to effect labor savings, automobiles are charged from ten to one hundred times as much. Such a differential in the rate "charged for identical services and facilities" is "prima facie discriminatory." *Swayne & Hoyt, Ltd.* v. *United States,* 300 U.S. 297, 303 (1937).

To find no violation of law in these circumstances the decisions below hold that the statute does not mandate equality. It is enough that "substantial benefits" are present; that other persons, identically situated, are paying less for the same benefits is not unjust or unreasonable. Although the Commission found that there was "little likelihood of mechanical improvement in the method of unloading automobiles" and that "auto shippers will probably re-

ceive only general benefits from the fund plan," it held that there was no infraction of section 17 (R. 677a).

> "[T]here is no statutory requirement that all users of a facility be assessed equally. As long as 'substantial benefits' are provided for one against whom a charge is levied, we will not normally declare the charge unlawful."

The court below not only accepts this construction, but the logic of its opinion extends it to section 16 as well. (App. A. 22a-23a, 25a).

If some people can lawfully be charged more and other people less for the same services, what is prejudice? Or disadvantage? Or reasonableness? What does the statute proscribe, if anything? Only outright larceny, an exaction for which nothing is given in exchange, would seem to be banned.

Not only is such an interpretation of sections 16 and 17 inconsistent with the general understanding of the meaning of the statutory language when they were enacted, but it is in conflict with *California* v. *United States*, 320 U.S. 577 (1944). In that case the Commission's predecessor found that San Francisco terminals were violating sections 16 and 17 of the Act by, *inter alia*, not recovering their costs in the charges they made for wharf storage and other services. What difference should it have made there that, if wharf storage failed to supply "revenue sufficient to meet the cost of the service, the burden would be shifted to those who paid appellants for other terminal services, such as docking of vessels, loading and unloading, and transportation privileges over and through the terminals"? 320 U.S. at 581-582. Presumably, those paying for the "docking of vessels" and the other services mentioned were receiving "substantial benefits" in return. If nothing more were required to exclude application of sections 16 and 17 no significance would attach to the fact that they might have been overcharged for such benefits. Or, if benefits need not be related to burdens, why the elaborate attention

paid to cost accounting in *Terminal Rate Structure-Pacific Northwest Ports*, 5 F.M.B. 53 (1956)?

According to the Commission, only malice, a "design deliberately to burden," will bring section 17 into play (R. 677a):

> "An exception to the above principle might arise if it could be shown that the leviers of a charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than another" (*Ibid.*).

Concededly, MTC had no such discriminatory intent and the Commission did not examine what motivated PMA nor how PMA's decisions had been affected by petitioner's employment of chartered vessels competing with PMA's dominating liner members.

Nothing in the language of the statute or its past interpretation makes improper motivation an essential element of an "unjust or unreasonable practice." Construing parallel legislation designed to destroy discrimination in land carriage, this Court has held undue preference or discrimination not to be precluded by the absence of "favoritism or malice." *United States* v. *Illinois Central R.R.*, 263 U.S. 515, 523-524 (1924); *Interstate Commerce Comm'n* v. *Chicago Great Western Ry.*, 209 U.S. 108, 122-123 (1908). The Shipping Act, intended by Congress insofar as similar terms are employed to have "like interpretation, application and effect," should receive the same construction. *United States Navigation Co.* v. *Cunard Steamship Co.*, 284 U.S. 474, 480-481 (1932).

By reading sections 16 and 17 as permitting enormous disparities in the charges made under identical conditions for identical services, the decisions below, unless reviewed and reversed, will frustrate the legislative purpose to ensure individual shippers the right to carry on their activities on an equal basis.

III

The improper invasion of the administrative area by the court below calls for the exercise of this Court's supervisory power.

It is black letter law "that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis. To do so would propel the court into the domain which Congress has set aside exclusively for the administrative agency." *Securities & Exchange Comm'n* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947); *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168-169 (1962).

These principles were entirely disregarded by the Court of Appeals. To it, petitioner had argued that the agency had erred in applying section 17 solely to MTC's actions in trying to pass on the PMA assessments to petitioner (R. 653a-655a, 676a-678a, 722a-723a; App. A, 13a). The examiner had explicitly refused to review "the justness or unjustness, reasonability or unreasonability of the actions of PMA, or the aims and purposes" of the agreement "between and among PMA members" (R. 653a). He, and the Commission, had stopped with holding that it was not unreasonable for MTC to pass on to petitioner the amount which MTC were obligated to pay PMA on petitioner's cargo (R. 653a-655a, 676a-678a, 717a-722a).

The court's opinion reflects its agreement with petitioner:

> "We reject at the outset of our discussion of section 17 respondent's argument that the issue of the unreasonableness of the charge itself can be entirely ignored because petitioner is charging MTC

> and not PMA with the violation. The complaint, fairly read, charges all members of PMA—including MTC—with an unreasonable practice in the method of computing the assessment" (App. A, 18a n.8).

But since neither the examiner nor the majority in the Commission had deemed "the method of computing the assessment" to be covered by section 17, neither had considered how consistent the PMA plan in its entirety was with the requirements of section 17 nor made ultimate findings or reached any conclusions with regard thereto. These deficiencies the court proceeded to cure itself. Reviewing the evidence before the Commission, the court determined that PMA had not acted unreasonably:

> "Our examination of the PMA Committee report and the reasoning supporting its conclusions leads us to conclude that the assessment was reasonable" (App A, 20a). *

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* Parenthetically, none of the court's reasons for finding PMA's actions reasonable (App. A, 20a-22a) will bear close examination.

That PMA considered and rejected other alternatives—one of the three points considered by the Court of Appeals in its scrutiny of the reasonableness of PMA's action—proves nothing regarding the justness of the plan it did adopt. Similarly, even if we assume that administrative convenience alone will justify discrimination—this was the second point made by the court below—how does such convenience explain PMA's action? Administrative convenience would have been equally well served by a tax on Volkswagen automobiles based on weight as by one using measurement, which would have equalized the burden as between automobiles and other general cargo. Where it suited PMA to adjust the tax as in the case of coastwise lumber, administrative inconvenience posed no impediment.

Similarly, that PMA had in the past distributed certain costs in a similar fashion—the third and last point considered in the opinion—is meaningless unless all the facts are known regarding the earlier action. Conceivably, this may have been a reasonable method of allocating the particular costs involved in the prior allocation; on the other hand, it too might have been discriminatory. Discrimination gains no sanctity by repetition. As for the tax decisions relied on by the court, these are entirely inapposite since public taxing bodies do not operate under the restrictions Congress has deliberately placed upon the power exercised by private cartels in the shipping industry.

This conclusion permitted the court to find that there was likewise "no significant basis" for petitioner's section 16 claim (*id.*, 25a). Accordingly, it did not pass on petitioner's point that the Commission had erred in ruling that section applicable only where competitive cargo was preferred. In fact, no competitive relationship is necessary where shippers are charged "disguised markups of widely varying amounts" on "substantially identical services" and "for no apparent reason." *New York Foreign Freight Forwarders & Brokers Ass'n* v. *Federal Maritime Comm'n*, 337 F.2d 289 (2d Cir. 1964), *cert. denied*, 380 U.S. 910, 914 (1965); *Investigation of Free Time Practices-Port of San Diego*, F.M.C. No. 1217, pp. 25-29 (May 25, 1966).

Thus, although the court sustained the results reached by the Commission under sections 16 and 17, it did so on the basis of facts found by it alone, not the Commission, and on grounds entirely different from those relied on by that agency.

And, what is most disturbing, the court arrived at results regarding the PMA assessment directly contrary to those which the Commission might well have reached. The court treated as irrelevant what the agency considered of paramount importance. Bad as the Commission's interpretation of section 17 is, it has at least the merit of recognizing that otherwise unexceptionable practices may violate the Act if maliciously motivated. But the Court of Appeals, in clearing PMA's assessment of illegality, held PMA's intent to be outside the case.

> "We are not to be taken as closing our eyes to petitioner's claim that it is the target of a combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter. That issue is not for the Commission or the court in this proceeding" (App A, 25a n.13).

The judicial function was temporarily exhausted when the court concluded the issue of the reasonableness of the method of computing the PMA assessment to be present. Proper respect for the balance between the executive and the judiciary dictated that the matter be remanded to the Commission to give it an opportunity to consider this issue, to make its ruling and to state the reasons for its action. *National Labor Relations Board* v. *Metropolitan Life Ins. Co.*, 380 U.S. 438, 442-444 (1965); *Interstate Commerce Comm'n* v. *J. T. Transport Co.*, 368 U.S. 31, 93 (1961).

Review of administrative action falls more often to the court below than to any other tribunal. Its invasion of the administrative function should not be permitted to go uncorrected.

Conclusion

The number of people and the amount of money directly involved in the assessments challenged here would alone justify the attention of this Court. Every ton of cargo entering or leaving the Pacific coast is affected by the PMA tax. The total levy annually is about five million dollars a year. To date approximately thirty million dollars has been collected; on petitioner's cargo alone about half a million dollars is owing.

PMA's annual toll can be expected to continue. Already the terminal date originally fixed has been changed to permit enlargement of the Mech Fund. Furthermore, what the Pacific coast is doing may well be copied elsewhere, including the Eastern seaboard.

But far overshadowing these considerations, important as they are, is the effect of the decision below on the administration of the Shipping Act, the cornerstone of American maritime policy. That Act "rests on the assumption that the prosperity of our foreign commerce and

the maintenance of a strong and independent merchant marine can best be secured through strict administrative surveillance of shipping conferences, agreements, and operations, insistence upon fair play and equal treatment for shippers large and small, protection of cargo and ports against unfair discrimination, and prevention of practices designed to eliminate or hamper independent carriers." H.R. Rep. No. 1419, 87th Cong., 2d Sess., 381 (1962). All these objectives are now jeopardized.

For these reasons it is respectfully requested that the Court grant this petition for a writ of certiorari.

Dated: March, 1967.

Respectfully submitted,

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APPENDIX A

Opinion of United States Court of Appeals for the District of Columbia Circuit

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,840

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER

v.

FEDERAL MARITIME COMMISSION

and

UNITED STATES OF AMERICA, RESPONDENTS

PACIFIC MARITIME ASSOCIATION,
MARINE TERMINALS CORPORATION, INTERVENORS

On Petition to Review and Set Aside Order of the Federal Maritime Commission

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Decided December 22, 1966

Mr. Walter Herzfeld, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. Richard A. Whiting* and *Robert J. Corber* were on the brief, for petitioner.

Mr. Walter H. Mayo, III, Attorney, Federal Maritime Commission, with whom *Assistant Attorney General Turner, Messrs. James L. Pimper*, General Counsel, *Robert N. Katz, Solicitor*, Federal Maritime Commission, and *Irwin A. Seibel*, Attorney, Department of Justice, were on the brief, for respondents.

Opinion of United States Court of Appeals for the District of Columbia Circuit

Mr. Gary J. Torre, of the bar of the Supreme Court of California, *pro hac vice*, by special leave of court, with whom *Mr. Edward D. Ransom* was on the brief, for intervenor, Pacific Maritime Association.

Mr. Arthur R. Albrecht entered an appearance for intervenor, Marine Terminals Corporation.

Before McGowan, Tamm and Leventhal, *Circuit Judges.*

Per Curiam: This case is before this court on a petition to review and set aside an order of the Federal Maritime Commission. Petitioner is a German corporation which manufactures Volkswagen automobiles. It ships large quantities of automobiles to ports on the Pacific Coast by means of common carrier and chartered vessels. Marine Terminals Corporation [hereinafter MTC], respondent below, intervenor here, operates ocean terminals at San Franciso and Long Beach, California, where it provides stevedoring services for both common carriers and charter vessels. Pacific Maritime Association [hereinafter PMA], intervenor below and before this court, is a nonprofit corporation made up of common and contract carriers, marine terminal operators, and stevedore contractors. PMA was organized in 1949 for the purpose of negotiating and administering labor contracts with labor unions on behalf of its members. MTC is a member of PMA; Volkswagen is not, since shippers are not eligible for membership in the organization.

I.

In order to understand the present controversy between the parties, it is necessary to review briefly the origins of their dispute. As noted, PMA serves as the collective

bargaining representative for its members. In 1957 the members desired to introduce work-saving devices into the industry and to be free of strikes and slowdowns during the period of transformation to greater mechanization. In its capacity as the representative of longshoremen and marine clerks, the International Longshoremen's and Warehousemen's Union [hereinafter ILWU] desired assurances from PMA that its members would share in the monetary benefits realized from the introduction of work-saving devices.

As a result of extensive negotiations between PMA and ILWU, a "Mechanization and Modernization Fund" of $29,000,000 was agreed upon. This fund was to be collected over a nearly six-year period from PMA members and to be used to cushion the effects of higher production upon longshoremen and marine clerks displaced by the mechanization. Since PMA's membership was responsible for payment of the fund, the ILWU agreed to allow PMA to be sole determinator as to how the fund should be accumulated. The necessity for the fund itself is not here in controversy; in fact, all parties agree that it serves a salutary purpose. What is in controversy is the funding method approved by PMA to raise the money from its members.

In order to determine how its members should be assessed in accumulating the fund, a Work Improvement Fund Committee was appointed by PMA. The majority of the Committee recommended that members should be assessed on the basis of tonnage carried or handled, with bulk cargo being assessed one-fifth the rate of general cargo.[1] The rate for general cargo was set at 27½¢ per ton carried or handled; the special category of bulk cargo was to be assessed at 5½¢ per ton carried or handled.

[1] In adopting the majority report, a minority report recommending that a combined man-hours—tonnage method of assessment should be used was rejected.

Each member of PMA was to remit to PMA, as trustee for the fund, an amount equal to the per tonnage assessment, a ton constituting for the purposes of the assessment 2000 pounds weight, or 40 cubic feet measurement.

The Committee recommended that the assessment be based on the cargo "as manifested" for loading or discharging at Pacific Coast ports. Usually any particular type of cargo is manifested, consistently, either on a weight or measurement basis. Thus the amount of the assessment for any particular commodity would be directly related to whether that commodity was manifested by weight or measurement tons.

There is no uniform way of manifesting automobiles. In the foreign trades they are manifested on a unit basis on chartered ships, but weight and sometimes measurement is shown (the unit price including costs, overhead and profit to the terminal operator, as well as an assessment for PMA dues.) On common carriers both weight and measurement are shown. Tariffs are on a unit basis but dependent upon measurement. In the coastwise trades, autos are manifested and freighted by weight.

Despite the fact that automobiles were manifested in these different ways, PMA determined that automobiles should always be assessed for the mechanization fund on a measurement ton basis regardless of how they were manifested. This treatment of automobiles was in contradistinction to all other cargo which was assessed according to the manner in which it was manifested.

II.

Cast against this background, Volkswagen's grievance comes into sharper focus. If considered on a measurement ton basis, a Volkswagen automobile measures 8.7 tons, whereas if a weight ton basis is utilized, it measures only 0.9 tons. An assessment for the fund based on

measurement tons at 27½¢ per ton equals $2.35 per automobile; the same assessment based on weight tons equals $.25. Thus the utilization of the measurement ton as the standard results in an assessment more than ten times greater than if the weight ton were to be used.

Volkswagen promptly protested to PMA the "discriminatory burden" imposed upon automobiles in general and Volkswagens in particular. Since this make of automobile constitutes by far the largest number of automobiles imported through Pacific Coast ports, the "ten times heavier tax," it argued, was in fact an excessive tax on Volkswagens. In addition, Volkswagen protested favorable treatment accorded by PMA to scrap metal and lumber cargo which were relieved of paying a major part of the assessment by virtue of "depressed" conditions in these industries. Petitioner also argued that the "tax" was particularly inequitable as applied to its operations since, because of previous modernization made in the handling of automobiles, no substantial savings could be expected in the handling of Volkswagens as a result of the institution of the mechanization fund. Petitioner's arguments to PMA were to no avail; Volkswagen has, however, refused to pay the assessment as calculated on a measurement ton basis.

Volkswagen's refusal to pay the assessments on its automobiles prevented the terminal operators (and particularly MTC) from paying to the PMA fund the assessments due on this cargo. It was both theoretically and practically impossible for the terminal and stevedoring companies to absorb the 27½¢ per ton assessment on automobile cargo ($2.35 per auto) since their profit per automobile does not exceed $1.00. MTC sought advice from PMA as to what "stand we can take in demanding payment of the assessment." MTC requested PMA's Board of Directors for authority "to bring suit against Volkswagen for the monies due." Rather than have MTC

sue Volkswagen directly, however, it was determined by PMA that it would sue MTC and the other onshore operators engaged in discharging Volkswagen automobiles and they would in turn implead Volkswagen. PMA did bring suit against MTC in the United States District Court for the Northern District of California; when Volkswagen was impleaded by MTC, the District Court stayed the proceedings in that court at the request of Volkswagen to enable it to institute proceedings before the Federal Maritime Commission under the Shipping Act of 1916, amended, 46 U.S.C. § 801 *et seq.* (1961). The district court granted the stay and petitioner began these proceedings.

The following issues were submitted to the Commission for its determination:

> "1. Whether the assessments claimed from [Volkswagen] are being claimed pursuant to an agreement or understanding which is required to be filed with and approved by the Federal Maritime Commission under Section 15[2] of the Shipping Act, 1916, as

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[2] Section 15, 46 U. S. C., section 814.

* * *

Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement"

amended, 46 U.S.C. 814 (1961), before it is lawful to take any action thereunder, which agreement has not been so filed and approved.

2. Whether the assessments claimed from [Volkswagen] result in subjecting the automobile cargoes of [Volkswagen] to undue or unreasonable prejudice or disadvantage in violation of Section 16 of the Shipping Act, 1916, as amended, 46 U.S.C. 815.[3]

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in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations.

* * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation.

[3] Section 16, 46 U.S.C., section 815.

* * *

It shall be unlawful for any common carrier by water, or other person subject to this chapter, either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.

> 3. Whether the assessments claimed from [Volkswagen] constitutes an unjust and unreasonable practice in violation of Section 17 . . ."[4]

Subsequently hearings were held, and the Examiner issued his initial decision finding, *inter alia*, that MTC and PMA were persons subject to the Shipping Act and that the agreement entered into between MTC and other PMA members was a "cooperative working arrangement." The examiner went on to find, however, that the cooperative working arrangement between MTC and the other members of PMA was not such an arrangement required by Section 15 of the Shipping Act to be filed with and approved by the Federal Maritime Commission. The Examiner also found no violation of Section 16 or 17 of the Shipping Act.

Before the Commission, both MTC and PMA contested its jurisdiction, MTC arguing that they were not "other persons" under Section 1 of the Act[5] and PMA arguing that the exclusive jurisdiction given the National Labor Relations Board over collective bargaining precluded the Commission from having jurisdiction in the instant case.

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[4] Section 17, 46 U. S. C., section 816.

* * *

Every such carrier and every other person subject to this chapter shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Board finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

[5] The term "other person subject to this chapter" means any person not included in the term "common carrier by water," carrying on the business of forwarding or furnishing wharfage, dock, warehouse, or other terminal facilities in connection with a common carrier by water. 46 U.S.C. § 801.

The Commission did not resolve the jurisdictional question, but rather assumed for the purposes of its decision that both MTC and PMA were subject to the Act. Even though it found the literal language of Section 15 broad enough to encompass any "cooperative working arrangement" entered into by persons subject to the Act, the majority of the Commission held Section 15 inapplicable to PMA's agreements regarding the mechanization fund because it interprets that section to apply

> "only to those agreements involving practices which affect that competition which in the absence of the agreement would exist between the parties when dealing with the shipping or traveling public or their representatives."

The agreement among the members of PMA, the Commission found, was not, standing alone, such an agreement that would affect competition by parties in vying to serve outsiders who are not parties to the agreement. In order to find a Section 15 agreement, the Commission held that there must be demonstrated that there was "an additional agreement among the PMA membership to pass on all or a part of its assessments to the carriers and shippers served by the terminal operators." The Commission determined, however, that the "record is devoid of evidence showing the existence of such an additional agreement."

The two dissenting Commissioners did not agree with the majority members on this point, arguing that Section 15 requires that the agreement in question should have been filed with the Commission.

The Commission further found that no violation of Section 16 existed because petitioner had failed to show that cargo competitive with its automobiles (id est, other automobiles) had been preferred. As for Section 17, the Commission, although noting that MTC conceded that "the

method of assessment against automobiles on a tonnage basis is unfair," found no "unreasonable practice" because "there is no statutory requirement that all users of a facility be assessed equally."

III.

Petitioner argues ably and earnestly before this court that the Commission has erred in approving the agreements involved in this case. It charges that PMA is dominated by liner interests and that the discriminatory "tax" on Volkswagen automobiles has been meted out to transfer to Volkswagen the financial burden which liner cargo should be carrying. It argues that the PMA committees set up to implement the funding of the mechanization fund are controlled by the shipping lines who are members of PMA and that the decision regarding how heavily automobiles should contribute to the fund always lay with these shipping lines.[6] Since over seventy per cent of Volkswagen's automobiles arrive by chartered vessel (non-PMA members) and many of the remainder are carried by liners not members of PMA, the higher automobile tax falls heaviest on Volkswagen and serves to lessen the amount of assessment on other general cargo carried by the shipping lines who are PMA members.

[6] It is interesting to note in this regard that under PMA's by-laws, its carrier membership have a majority on its Board of Directors and the controlling vote at membership meetings. In addition, carriers furnish all the members of both the PMA committee appointed to consider how the cost of the mechanization fund should be allocated and the committee subsequently formed to pass upon any inequities resulting from that method. Neither committee included any independent terminal operators or stevedoring contractors. The hearing examiner found "that there is no substantial evidence in the record to support Volkswagen's contention that liner interests dominate PMA."

Volkswagen charges that PMA is attempting to utilize automobile cargo, which the liner interests do not in the main carry, to subsidize other forms of cargo carried by the liner interests. Volkswagen further charges that on all cargo loaded or discharged on behalf of PMA's carrier members, the carrier member must bear the cost of the mechanization fund payments; however, on cargo arriving by chartered vessel (such as seventy per cent of Volkswagen), the burden of the tax falls upon the non-PMA member shipper (Volkswagen). Thus it is to the financial advantage of PMA liner members to place a disproportionately heavy assessment on automobiles.

With respect to the question of whether there was an agreement in this case under Section 15, petitioner argues that the collective action engaged in by the members of PMA as embodied in its agreements is exactly the type conduct which Congress intended to regulate when it passed the Shipping Act. It states that Section 15 requires the filing and approval of *every* agreement, by which is meant as well an "understanding," falling into one of seven categories enumerated in the Act. (See note 2, *supra.*) Included in these categories is any agreement

> "fixing or regulating transportation rates or fares; . . . controlling, regulating, preventing or destroying competition; . . . or in any manner providing for an exclusive, preferential or cooperative working arrangement."

Petitioner argues that, giving the statutory language its plain meaning and a reasonable interpretation, the PMA agreements clearly serve to bring about all of these proscribed consequences.

Petitioner also attacks the Commission's holding that a Section 15 agreement must be between parties in competition with one another and its further holding that the agreement must relate to a specific aspect of the compe-

tition between them, that is, competition with reference to the "shipping or travelling public, or other representatives." Such a reading of the Act is far too narrow, it argues, and all but emasculates the Act as an effective means of regulating congressionally proscribed conduct in the industry. Moreover, the Commission's interpretation serves to remove from the Act's jurisdiction agreements involving persons between whom no competition has ever existed as, for example, an ocean carrier and a freight forwarder, both of whom are subject to the Act.

Finally, petitioner argues with respect to Section 15 that, even if the Commission's construction of the statute were on sound ground, it would still have erred in concluding that such construction left the cooperative working arrangement outside Section 15. As the Commission made plain, it would have found such arrangement within the statute if there were

> "an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators."

Petitioner attacks the Commission's characterization of the record as being "devoid of evidence" showing the existence of such an additional agreement. It points to the fact that, as a logical and practical matter, it necessarily had to be within the contemplation of the PMA terminal operator members and stevedoring companies that the assessment would be passed on to shippers because when MTC and the other PMA members voted the assessments they knew that they could not pay them without increasing their charges to petitioner. The assessments, it is argued, "were agreed to with this as a silent predicate. There was no need to secure explicit agreement regarding action to which there was no alternative." Petitioner further argues that all involved knew

that the passing on of the PMA assessment to Volkswagen was an integral part of PMA's program. Thus, when Volkswagen refused to reimburse MTC, PMA made no serious attempt to collect the assessments from MTC nor did it dispute MTC's description of itself as "only a collection agency" in the matter. Petitioner points further to the fact that MTC has never made any payments to PMA on cargo on which Volkswagen has refused to recognize any obligation to pay, although MTC has made all other payments called for by the cooperative working arrangement. This conduct, petitioner argues, demonstrates an "understanding" within the contemplation of Section 15 to pass on the assessments to petitioner.

Petitioner also attacks the Commission's determination that there was no Section 16 violation involved in this case because petitioner had failed to show that cargo in competition with its automobiles had been preferred. Petitioner argues that, although past precedents of the courts and Commission support a "competition" requirement, more recent cases have done away with such a requirement. It argues that the focus of the Commission should be on the fact that the assessment of automobiles based upon measurement tons coupled with favored treatment given other cargo serves to provide other cargo with a "preference and advantage" not granted petitioner, which is undue prejudice in clear violation of the Act.

With respect to Section 17, petitioner argues that the Commission erred in not finding an unreasonable and/or unjust practice by MTC in the execution of the PMA agreement. It faults the Commission for failing to look at the method for allocating the cost of the fund, and for failing to consider under Section 17 the making of the monthly payments to PMA by the terminal and stevedoring companies. It argues that the cooperative working arrangement among the membership of PMA is, in fact, illegal under the antitrust laws as a price fixing arrange-

ment and therefore necessarily unreasonable under Section 17 and that the arrangement is inequitable because it distributes a common cost in an unfair and unreasonable fashion. Finally, it attacks the Commission's determination that there need only be "substantial benefits" accruing to one against whom a charge is levied, and its decision that it is not necessary that benefits and burdens be directly related.

IV

Before deciding the questions proposed here, reference must be had to the principles which are to guide us in reviewing decisions of an administrative agency such as the Federal Maritime Commission. Our touchstone here has to be the Supreme Court's recent decision in *Consolo* v. *FMC*, 383 U.S. 607 (1966), where the Court, in the course of reversing a decision of this court, spoke at length concerning the meaning of the substantial evidence rule which appellate courts are to apply to decisions of the Federal Maritime Commission. In *Consolo*, the Court stated:

> "Section 10(e) of the Administrative Procedure Act . . . gives a reviewing court authority to 'set aside agency action, findings and conclusions found to be (1) arbitrary, capricious, [or] an abuse of discretion . . . [or] (5) unsupported by substantial evidence. . . . Cf. *United States* v. *Interstate Commerce Comm'n*, 91 U.S.App.D.C. 178, 183-84, 198 F.2d 958, 963-64, *cert. denied*, 344 U.S. 893. We have defined 'substantial evidence' as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *Labor Board*, 305 U.S. 197, 229. '[I]t must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300. This is something less than the weight of the evidence,

> and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U.S. 105, 106; *Keele Hair & Scalp Specialists, Inc.* v. *FTC*, 275 F.2d 18, 21.
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> Congress was very deliberative in adopting this standard of review. It frees the reviewing courts of the time consuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps to promote the uniform application of a statute."

Although numerous statements and re-statements of the substantial evidence rule as interpreted and applied by federal appellate courts might also be cited, we believe that what was recently said by this court in *Philadelphia Television Co.* v. *FCC*, —— U.S.App.D.C. ——, —— F.2d —— (No. 19,577, March 28, 1966) has particular relevance with respect to the task confronting this court in reviewing the decision of the Commission in the instant case. There we said that

> "to sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceeding."

Deference must also be paid in this case to the Commission's expertise, especially in view of the technical and specialized nature of the subject area over which it has jurisdiction.

Applying these general principles to the specific issues before us in this case, and giving due deference to the expertise of the Commission, we conclude (albeit with some hesitation) that there is substantial evidence in the record considered as a whole to support the Commission's decision. The Commission's conclusion that the funding agreement standing alone does not come within the pro-

visions of Section 15 is a tenable one and not arbitrary or capricious, especially in view of the paucity of dispositive precedent on the question.

The Commission's determination that the record is "devoid of evidence" showing the existence of an additional agreement by the PMA membership to pass on all or a portion of its assessments to the carriers and shippers served by the terminal operators presents a closer question. Petitioner points to a number of factors which tend to demonstrate the existence of such an agreement.[7] In addition, petitioner points out that as a practical and logical matter MTC had no choice but to pass on the cost of the assessment to the shipper since it was compelled to do so by economic necessity. Since MTC and the other terminal operators and stevedore companies were members of PMA, and since the logical and necessary consequence of their agreement to make the assessment was that such assessments would have to be passed on to the shippers, it necessarily follows that there was at least a tacit agreement among the terminal operators and stevedore companies that the assessment would be

[7] This evidence includes: a telegram from one of the PMA members handling Volkswagens expressing the opinion that the cost could never be assumed by the stevedore companies; a letter from MTC to PMA advising that "there is no way that the contractor could absorb such an increase"; a letter from MTC to PMA in which MTC described itself as "only a collection agency in this matter"; a letter expressing PMA's fears that if Volkswagen received a new rate the Army would demand the same for the transport of its automobiles; an inter-office PMA memo stating that the funding committee did not feel that the then present assessment worked a hardship on the *shipper;* minutes of a PMA meeting expressing the opinion that the money owed was due from Volkswagen and not MTC; the creation of an escrow agreement for payments of funds *on behalf of Volkswagen* (payment to be made by the stevedores).

passed on to the shippers. Petitioner, however, is not able to point to any direct testimony establishing that such an agreement was made.

In the face of the evidence relied upon by petitioner and the forceful logic of its argument, the Commission held that

> "to hold that a section 15 agreement existed on this record would require us to disregard explicit statements to the contrary as well as actions on the part of both the common carrier members of PMA and respondents inconsistent with the existence of such an agreement."

The question we must decide is whether the record considered as a whole contains substantial evidence to support the Commission's finding. It should be noted that what we are here concerned with presents essentially questions of fact—did the agreement take place, was there an "arrangement" between the parties, etc. Moreover, questions of credibility are involved since witnesses for PMA affirmatively denied the existence of any such agreement or arrangement, and the Examiner, who had an opportunity to observe the witnesses, found no agreement. In these circumstances, we believe that there is substantial evidence in the record considered as a whole to support the Commission's conclusion. Although we might be inclined to reach a conclusion different from that of the Commission were we considering the question *de novo*, or under a less restricted power of review than that enunciated in *Consolo, supra*, we are bound to give the Commission's decision the benefit of all reasonable inferences and our conclusion in so doing is that the Commission's determination that there was no additional agreement is supported by substantial evidence.

Turning next to Section 17,[8] careful consideration has been given by the court to petitioner's contention that the laying of the mechanization fund assessment on automobiles on a measurement basis rather than the weight basis used on the Volkswagen cargo as manifested is "an unreasonable practice . . . relating to . . . the handling of property" in violation of Section 17 of the Act.[9] The problems

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[8] Section 16 will be considered, *infra*, since our conclusions with respect to Section 17 have relevance in the resolution of petitioner's claim that it is a victim of discrimination in violation of Section 16. We reject at the outset of our discussion of Section 17 respondent's argument that the issue of the unreasonableness of the charge itself can be entirely ignored because petitioner is charging MTC and not PMA with the violation. The complaint, fairly read, charges all members of PMA—including MTC—with an unreasonable practice in the method of computing the assessment.

[9] The Commission's opinion concerning this issue recognized the salient facts relied on by petitioner and disposed of the problem with reasoning discussed, *infra*. The Commission said:

> It is true that the assessing of automobiles on a measurement basis results in an assessment ten times as great as would result from a weight basis, and that although other cargo is assessed as manifested, automobiles are always assessed on a measurement basis. It is further true that although the assessment on a measurement basis for some general cargo items exceeds the amount computed on a weight basis, in no instance is the difference as great as on automobiles, and that as there is little likelihood of mechanical improvement in the method of unloading automobiles, auto shippers will probably receive only general benefits from the fund plan, such as freedom from strikes or slowdown.
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> However, as complainant admits, there is no statutory requirement that all users of a facility be assessed equally. As long as "substantial benefits" are provided for one against whom a charge is levied, we will not normally declare the charge unlawful. *Evans Cooperage Co. Inc.* v. *Board of Commissioners*, 6 F.M.C. 415. The fact that the benefits may differ to some extent in both kind and degree is not material. An exception to the above principle might arise if it could be shown that the leviers of a

of the case under Section 17 are perhaps most clearly focused by adverting to the opinion of the dissenting member of the Commission, who concluded that PMA's entire system of measurement and allocation of this type of labor cost is unjust and unreasonable. In his view the core injustice ensued when PMA adopted the recommendation of a majority of its committee, which recommended a property basis of allocation of the assessment (in accordance with tonnage), whereas only through a labor measure of allocation such as that recommended by the minority (*id est,* man-hours with adjustments for inequities) can the burden of this labor cost become a just cost of business. The property measure, he concluded, opens the door to a singling out of particular traffics or persons for disadvantage, and this, in turn, is possible because PMA's control of the market precludes corrective control by competitive forces.

The majority of the Commission was aware that a minority of PMA's committee recommended that the assessment be based in substantial part on the relative man-hours of the various stevedoring companies involved. Indeed, as the Examiner noted, the first $1,500,000.00 mechanization fund raised by PMA, during 1960, pending the report of the Committee, had been collected on a man-hour basis. However, PMA members complained that this method was unfair, and the majority of the Commission concurred in this conclusion.

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charge imposed it in an unequal fashion because of a design deliberately to burden one of the users of its service more than another.

The assessment here, however, has been levied in its present form because it was necessary in the business judgment of respondents to do so. The reasonableness of respondents' activities is attested to by the additional facts that they have sought to change the method of "Mech" fund [11] assessment on automobiles, have offered to pass on only a part of the assessment, and have levied a part of their dues assessment against Volkswagen for several years upon the same measurement basis without protest.

Our examination of the PMA Committee report and the reasoning supporting its conclusions leads us to conclude that the assessment was reasonable. It appears that the Committee began by considering the possibility of apportioning the assessment on the basis of who obtained a savings as a result of now-permitted mechanization. An expert of the Bureau of Labor Statistics was engaged to explore the possibility of measuring productivity improvement. The PMA turned away from this approach, partly because it feared that its adoption would help the Union enlarge its later demands and partly because the system was unfeasible due to complexity, including the difficulty of determining which savings were attributable to this or other factors. The Committee felt it to be essential to arrive at a system that would not be excessively burdensome to anyone, yet would be simple in its administration.

In rejecting continuance of the initial man-hours basis,[10] the majority of the Committee reported:

> "They were struck by the inequity of a contribution formula based on man-hours which would provide for a decreasing percentage of the total contributions to the Fund by the operators which made greatest use of and received the greatest benefit from the new agreements, and were most contributing to the loss of work opportunity that gave impetus to the Union's demand for the fund and would be invoked in future bargaining as the ground for continuing the Fund."

The Committee was troubled by the inequity of most rewarding with low assessments those who had already mechanized most when it was their past reduction of work hours that had galvanized the Union into the activities that led to this industry-wide labor cost assessment.

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[10] The majority considered that the reasons against continuance of a man-hour basis also militated against partial reliance on this factor, as recommended by the majority.

The Committee recommended a formula based on cargo tonnage as a "rough-and-ready" way to divide the cost, admittedly lacking the refinement of the productivity measurement method but also lacking its infeasibility and avoiding the inequity of the man-hour method whereby contributions are in *inverse* proportion to benefits received. It considered that cargo volume though not necessarily proportional was some indicator of stevedoring activities and that administrative simplicity was a cardinal consideration.

The Committee recognized further that there were also objectionable features of the tonnage formula but considered these to be less weighty than the objections inhering in the other formulae. It recommended that the formula be reviewed to prevent the continuation of any hardship or inequity that might develop.

It may be noted that the Union had proposed that a tonnage formula be incorporated in the collective bargaining agreement, but the PMA did not wish to limit its discretion in seeking and determining the most reasonable formula it could devise. Petitioner could presumably have had no complaint if PMA had acquiesced in the Union's demand. The PMA told the Union it wanted flexibility to allocate the labor cost on the basis of tonnage man-hours or both, and the Union agreed to let PMA decide the matter. (PMA also feared a tonnage charge levied under a Union agreement would have a tendency to persist into the next contract.)

In view of the foregoing, we cannot say that PMA was unreasonable in arranging for an allocation of this industry labor cost in accordance with volume tonnage already in industry use for a portion of PMA's dues. Tonnage dues, based on revenue tons of cargo, had been used for many years by PMA. PMA's function and budget relate

primarily to the negotiation and administration of union labor contracts. There was therefore in effect an industry custom and practice for using revenue tonnage for the purpose of allocating sundry labor costs. The mechanization fund is an additional labor cost administered by PMA.

Petitioner complains of the inequitable "tax" laid upon it. This use of the word "tax" is forensic rather than analytical, but it calls to mind various decisions which if anything militate against its declaration of arbitrariness. "Administrative convenience and expense in the collection or measurement of the tax" is a valid ground of classification in arranging the incidence of taxation. *Southern Coal & Coke Co.* v. *Carmichael*, 301 U.S. 495, 511 (1937). There is no requirement that for every payment there must be an equal benefit. *Houck* v. *Little River Drainage Dist.*, 239 U.S. 254, 264-65 (1915).

The Commission's doctrine follows the same line. Thus in *Evans Cooperage, Inc.* v. *Board of Commissioners of the Port of New Orleans*, 6 F.M.B. 415 (1961), a city's uniform wharfage charge was upheld, even though applied to cargo transferred from a barge to a vessel moored at a wharf without moving across the wharf, on the ground that "substantial benefits" were provided for the person being charged. The Commission noted that the barge and cargo enjoyed substantial benefits from the services and facilities, that "there can be no precise equivalence between services and charges" and that the service was "reasonably related to the charges."

The Commission upheld the assessments before us, noting the substantial benefits accruing to all cargo from the mechanization agreement. As the Commission noted, this is not to say that the mere existence of substantial benefits permits a tax laid solely on one sub-class of the

persons benefited. The Commission would presumably agree that the mere existence of the substantial benefits would not immunize an unreasonable classification system or egregious discrimination.[11] It does serve, however, to protect a system, reasonable on its face, that uses a "rough-and-ready" allocation measure, from attack on the ground that it is not precise.

Petitioner seeks to predicate infirmity in the PMA plan on the way it has been disadvantaged by developments subsequent to the original adoption of the PMA plan in January of 1961. In particular, petitioner complains of the interpretation that the tonnage basis of allocation should be based, not on the tonnage shown in the manifest as stated in the January, 1961 resolution, but on measurement tonnage in the case of automobiles. This ruling, announced in February, 1961, cannot be deemed unreasonable. Patently the manifest was not intended to be controlling in the sense of permitting a manifest to reduce assessments merely by referring to cargo on a weight basis, even though this had nothing whatever to do with the way ocean freight was determined—as is the case with petitioner which charters entire vessels. The record contains substantial evidence to show that PMA's January, 1961 resolution was to adopt a plan for allocating charges on the same revenue tonnage basis as had been used in PMA's dues. For general cargo and the bulk of commodities, revenue tons were measurement tons, except for

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[11] Practices at San Francisco Bay Area Terminals, 2 U.S.M.C. 588, 593, 595-96 (1941), aff'd California v. United States, 46 F. Supp. 474 (N.D.Sal. 1942), aff'd 320 U.S. 577 (1944). See also Investigation of Certain Storage Practices, 6 F.M.B. 301, 316 (1961); Storage Practices at Longview, Washington, 6 F.M.B. 178 (1960); California Stevedore & Ballast Co. v. Stockton Elevators, Inc., 8 F.M.B. 97 (1964).

certain bulk commodities manifested on dead weight tons. Treatment of automobiles as governed by measurement tons was merely the application of a 1958 ruling on PMA dues. That ruling in turn was based on industry practices in foreign trade and rejected efforts to report dues on weight basis by companies serving petitioner. Petitioner thereafter recognized and knowingly made reimbursement covering the expenses of its stevedores in paying PMA dues on a measurement ton basis. The interpretation complained of is not unreasonable and it does not render the assessment system unreasonable.

Petitioner stresses that it will receive relatively little benefits under the union agreement as applied with PMA's assessments and that it will incur more than a 20% increase in discharge cost, tenfold the average increase for general cargo. The record made by petitioner is strong—though not as strong as petitioner puts it.[12]

We cannot say, however, that the case is such as to require reversal of the order. As already noted, a generally reasonable rule for assessing benefits may be main-

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[12] (1) Thus it appears that Volkswagens are transported on liners (13,672 out of 42,598 units in 1962), and here the increase in discharge cost has been absorbed by the carrier.

(2) There is at least a question whether and to what extent the increase in stevedoring cost of private carriers may have been offset by decrease in cost of shipping by private carrier due to faster turn-around time.

(3) Another carrier of autos (Matson Transport) was enabled to make substantial saving in discharge cost. Thus automobiles in general may benefit more than petitioner in particular.

(4) The fund may have made it easier for MTC to eliminate a man on dockside.

tained though it produces some instances of burdens wholly disproportionate to benefits.[18]

In view of our ruling with respect to Section 17, it is apparent that there is no significant basis for the claim that petitioner is the victim of a discrimination that is unreasonable and hence unlawful under Section 16. Under the circumstances it is not necessary to consider whether and under what circumstances a rate practice that is purely "random" and *hence* inherently discriminatory may be challenged under Section 16 in the absence of a showing that competitive cargo has been preferred, *New York Freight Forwarders & Brokers Assoc.* v. *FMC*, 337 F.2d 289 (2d Cir. 1964), *cert. denied*, 308 U.S. 914 (1965).

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[18] We are not to be taken as closing our eyes to petitioner's claim that it is the target of a combination in restraint of trade, leveled by the common carriers dominating PMA against the hostile economic interest of this large-scale importer of automobiles by private charter. That issue is not for the Commission or the court in this proceeding. It suffices to say that agreements not approved by the Commission are not protected from attack under the antitrust laws. *Carnation Co.* v. *Pacific Westbound Conference*, 383 U.S. 213 (1966).

APPENDIX B

Judgment

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,840 September Term, 1966.

VOLKSWAGENWERK AKTIENGESELLSCHAFT, PETITIONER

v.

FEDERAL MARITIME COMMISSION

and

UNITED STATES OF AMERICA, RESPONDENTS

PACIFIC MARITIME ASSOCIATION,
MARINE TERMINALS CORPORATION, INTERVENORS

On Petition to Review and Set Aside Order of the Federal Maritime Commission.

Before: McGOWAN, TAMM and LEVENTHAL, *Circuit Judges.*

JUDGMENT

This case came on to be heard on the record from the Federal Maritime Commission, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this court that the order of the Federal Maritime Commission on review herein is affirmed.

Dated: December 22, 1966

PER CURIAM

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 22, 1966

NATHAN J. PAULSON
Clerk